MICHIGAN
LAW REVIEW

VOL. XXI NOVEMBER, 1922 No. 1

LABOR AND THE LAW IN THE PUBLIC UTILITY FIELD[1]

By GEORGE JARVIS THOMPSON*

TO the cynical this title may suggest a rhetorical antithesis, and the average citizen cannot but be a bit cynical as a result of his observation and experience of the actuality of the failure of the law to function for the preservation of the continuity of these essential public services in the frequently recurring outbreaks between organized capital and organized labor. In a great measure, he has only himself to blame for this unfortunate condition. He lent ear to the vote-seeking politician and to the propaganda of the interested parties, taking sides with one or the other without thought of his own welfare, until he came to regard the violent adjustment of the conflicting interests of these powerful, selfish groups as a more or less legitimate civil struggle, quite blinded to its sinister character by the euphonious phrase, "industrial warfare." The lengths to which this ever-present internal conflict was carried in the days of war, when the country was battling for its life, aroused the patriotic, thinking citizenship to the realization that the very foundations of our "government of the people, by the people, and for the people" were seriously threatened, but the average citizen, while somewhat disturbed, did not even then sense the real danger of the situation.

It was a courageous service, therefore, which President Harding rendered to the country when in his first annual message to

* University of Pittsburgh School of Law.

[1] The substance of this article was embodied in a paper read by the author before the Philosophical Society of Pittsburgh, Pa.

Congress[2] he pointed out the challenge to the public peace and welfare, and declared the supremacy of the law of the land over brute force in industrial controversies as well as in ordinary disputes. Without subterfuge or platitudes, the President squarely faced the true issue of "the superior interest of the community as a whole to either the labor group or the capital group," and suggested "that it should be possible to set up judicial or quasi-judicial tribunals for the consideration and determination of all disputes that menace the public welfare." It is significant, too, that he based his position upon the success already attained in the protection of the public interest from the unlawful aggressions of one of these groups through federal and state regulation of public service companies. That he would extend this remedy at least to the regulation of labor in the public utility field seems clear, for he says: "In the case of the corporation, which enjoys the privilege of limited liability of stockholders, particularly when engaged in the public service, it is recognized that the outside public has a large concern which must be protected; and so we provide regulations, restrictions, and in some cases detailed supervision. Likewise in the case of labor organizations, we might apply similar and equally well-defined principles of regulation and supervision in order to conserve the public's interest as affected by their operations." The President thus presents directly to the country the problem of labor and the law in the public utility field.

The twentieth century has witnessed the recognition and growth of what is commonly considered a new category of the Common Law—the law of public utilities—as peculiarly governing in the public service field. But in reality that law is simply the modern development and application of century-old principles that go back to the very roots of our common law system.[3] It is essential, therefore, to survey briefly these underlying principles of the law of public utilities, marking carefully the economic and social conditions which gave rise to them and the fact situation in which

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[2] December 6, 1921.

[3] ROSCOE POUND, "THE SPIRIT OF THE COMMON LAW" (1921), p. 29: "It is significant that progress in our law of public service companies has taken the form of abandonment of nineteenth century views for doctrines which may be found in the Year Books."

they are now called upon to function. In that way we shall appreciate labor in its true setting in this field as a component part of the greater whole of public service.

While it is common knowledge that certain enterprises are clearly public utilities and others distinctly private businesses, comparatively few know how the law determines, in the doubtful case of an undertaking possessing many of the characteristics of each type, whether or not it is a public utility. The common-law test of what constitutes a public service enterprise requires the concurrence of two general elements:

(1) An actual public necessity for the service, and (2) the presence of natural, economic, or legal limitations normally tending to empower those rendering the service arbitrarily to control the public need.

This second element may be illustrated by the case of an individual to whom has been granted an exclusive franchise to serve the inhabitants of a city with water. Here are presented the generally recognized types of limitations; the natural limitation of source of supply; the economic limitation of enormous investment sunk in that place, in the form of reservoirs, pumping stations, and distribution systems, rendering negligible as a business fact the chances of competition; and the legal limitation of an exclusive franchise.

The determination of public utility character is, then, a relative matter depending upon the application of this objective test to the actual circumstances surrounding the particular enterprise, and will vary with the changing natural and economic conditions of time and place. In a word, the purpose of the whole law of public utilities is the protection of the imperilled public interest, to the end that all may enjoy the common service on common terms. Obviously, this could not be entrusted wholly to the realm of agreement between that member of the public pressed by need of the service and the utility proprietor in his position of playing upon that necessity; hence from very early times the Common Law has regulated such privately conducted public service.[4]

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[4] See I WYMAN, PUBLIC SERVICE CORPORATIONS (1911), Ch. I, Topic A. The Mediaeval Policy of Regulation, citing numerous authorities from the Year Books.

To understand the embryonic development of the common law of the subject one must be familiar with the fourteenth and fifteenth century environment amid which it was formulated. The period was characterized by a static condition of society; transportation was dangerous, difficult, and expensive; sons were born to the trades of their fathers, and usually spent their entire lives in the community of their birth.[5] In such a narrowly restricted social order, dominated, outside the towns of free craftsmen, by the local overlord, around whom centered the community through various gradations of land tenure and personal retainer, it was inevitable that that relationship should fix the individual's social and economic status. Quite as naturally, the Common Law thrust upon him legal rights and obligations measured by a similar standard, for this accorded well with organic common-law traditions.[6] Relationship became the juristic basis of the Common Law, rights and duties being imposed according to the respective positions of the parties under the circumstances in relation to each other and to the community, without regard to the free-will of the individual.[7] Among

[5] See J. B. Cheadle, Government Control of Business, 20 COLUMBIA LAW REVIEW 550, *et seq.* The freedom of the subject to move from place to place within the realm or to depart therefrom was hedged about by proclamation and statute. The liberty to leave the realm granted by the *Magna Charta* of 1215 was deleted from the reissue of that great document in 1216, and during the reigns of Henry III, Edward III, and Richard II the right of the subject to depart the realm was carefully restricted. It was not until the reign of James I that these restrictions were removed. See MCKECHNIE, MAGNA CARTA, p. 473 (1905).

[6] "THE SPIRIT OF THE COMMON LAW," Dean POUND, after pointing out that the Common Law owes much to its *substratum* of primitive Germanic law with the fundamental recognition of the reciprocal relation of protection and subjection between the ruler and the ruled, adds: "In our law, however, the idea is a generalization from the results of the judicial working out of one problem after another by the analogy of the institutions with which courts were most familiar and had most to do in the formative period of English law, namely, the relation of landlord and tenant." An historical illustration of this dominating influence of real property law in other fields is Slingsby's Case, 5 Coke 18b (1588). Also see I WILLISTON ON CONTRACTS, s. 318.

[7] "Here the question was not what a man had undertaken or what he had done, but what he was. The lord had rights against the tenant and the tenant had rights against the lord. The tenant owed duties of service and homage or fealty to the lord, and the lord owed duties of defense and

the historical survivals of these old common-law relations may be mentioned those of landlord and tenant, master and servant, principal and agent, shipper and common carrier, and innkeeper and guest.

It was the age of public regulation. The statutes of laborers[8] fixed the workman's wage and the place of his labor; all trades were organized into guilds and the law recognized and controlled these labor organizations, while every business that professed to deal with the general public thereby became a common calling, and was carefully supervised in the public interest.[9] The subordination to the common-weal of the individual interests of those who served was the established order.

Where these relationships were based on situations involving active contacts between the parties thereto, under frequently shifting conditions, the Common Law regulated them by a series of legal standards of conduct based upon the broad generalization of reasonableness under the circumstances. From this source we derive our measure of due care in the law relating to negligence,—

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warranty to the tenant. And these rights existed and these duties were owing simply because the one was lord and the other was tenant. The rights and duties belonged to that relationship. Whenever the existence of that relationship put one in the class of lord or the class of tenant, the rights or duties existed as a legal consequence." POUND, THE SPIRIT OF THE COMMON LAW, p. 20.

[8] The famous Statute of Labourers, 23 Edward III (1349), occasioned by the scarcity of hired laborers following the "Black Death." Note the emphasis on the public necessity in the preamble: "Because a great part of the people, and especially of workmen and servants, late died of the pestilence, many seeing the necessity of masters and great scarcity of servants, will not serve unless they receive excessive wages, and some rather willing to beg in idleness than by labor to get their living; we, considering the grievous incommodities, which of the lack especially of ploughmen and such laborers may hereafter come, have * * * ordained * * *"

The great statute of 5 Eliz., c. 4 (1562), substituted a system of wage regulation adjusted annually by means of local wage boards consisting of the sheriff, mayors and justices of the peace of the respective counties. This statute was confirmed and explained by the subsequent Statute of Laborers of 2 Jac. I, c. 6 (1604).

See ROBERTS'S SOCIAL HISTORY OF THE SOUTHERN COUNTIES (London, 1856), p. 205 *et seq.*, for examples of the annual regulation of wages by the magistrates, giving the wage lists with figures for the years 1444 and 1633.

[9] See note 5, *supra*.

that everyone owes a duty to exercise the care that an average reasonable man would use under the same or similar circumstances, and also the principal obligations to this day imposed upon those engaged in rendering a public service, namely, to furnish a reasonable service, at reasonable rates, without unreasonable discrimination in the light of the *de facto* situation then and there prevailing.[10]

It is to be noted that these legal foundations were laid in this field before the introduction into our law of the modern theory of contract in the sense of enforceable parol promises with their connotation of the individual's free-will assumption of the respective obligations. In spite of the nineteenth-century attempt to interpret all law in terms of contract, our modern courts, harking back to this older law, came to realize that they were confronted with the typical fact situations to meet which the early Common Law worked out its characteristic institution of the reciprocal relationship, and that in consequence, while the parties to a public utilities transaction may by contract modify these imposed rights and duties between themselves, they do so subject to the paramount power of the law to protect the public interest by varying or striking down such an agreement if necessary.[11]

The Common Law enforced the observance of these legal standards through the legislature and the courts, the former laying down reasonable rules for the future, and the latter passing upon the reasonableness of existing regulations and practices of the utilities and punishing offenses committed. Although many authorities

[10] An excellent exposition of this subject may be found in an address by Dean Pound, Administrative Application of Legal Standards, 44 AM. BAR ASSOCIATION REPORTS, p. 456 *et seq.*

[11] Speaking of the recent return swing of the juristic pendulum from contract to status, Dean Pound observes: "Taking no account of legislative limitations upon freedom of contract, in the purely judicial development of our law we have taken the law of insurance practically out of the category of contract, and we have established that the duties of public service companies are not contractual, as the nineteenth century sought to make them, but are instead relational; they do not flow from agreements which the public servant may make as he chooses; they flow from the calling in which he has engaged and his consequent relation to the public." THE SPIRIT OF THE COMMON LAW, p. 29. For a discussion of the recent authorities the reader is referred to a note, "Right of Public Service Company or State Commission to Alter Rates Fixed by Contract," in 32 HARV. LAW REVIEW 74, and 33 HARV. LAW REVIEW 97.

place the earliest legislative regulation of the rates of common carriers near the beginning of the reign of William and Mary, about 1691,[12] an instance of the exercise of this legislative function may be found far back in this formative age of the Common Law in the statute of 4 Ed. III, c. 8 (1330) fixing rates for the passage over the seas at the Port of Dover at two shillings for a horseman and six-pence for a footman, and providing that all other passages over salt or fresh water should be at rates as of old.

This ancient legislative power seems, however, to have lain dormant for centuries, and when the advent of the modern industrial era, accentuating a hundred-fold the dependence of the people upon the public utility, wrought conditions demanding its revival for the protection of the public interest, the legislature, primarily a political body, proved a most unreliable medium, for even when it did function it possessed no means of adjusting its rules to meet the kaleidoscopic changes in economic and social conditions incident to the remarkable progress of science and invention in the public service field.

The courts, on the other hand, although possessing the power to enforce this law of public utilities, could exercise that power only subsequent to the occurrence of the wrong or injury. The practical result, therefore, was that the law acting through these instrumentalities did not function successfully in this field, since, measured by the actualities, its redress was often both formal and futile.

The rapid development of the steam railroad, with its unprecedented concentration of political and economic power in private hands, awakened the public to the need of a more flexible, systematic, and direct instrumentality of regulation that could specialize in and act immediately upon the problems peculiar to the public utility field, and as early as the middle of the last century we find the legislatures attempting to remedy this situation by the creation of administrative bodies called "Railroad Commissions."[13] So well

[12] 3 William and Mary, c. 12 (1691). See Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155, 161 (1877); Trustees of Saratoga Springs v. Saratoga Gas, E. L. & P. Co., 191 N. Y. 123, 83 N. E. 693 (1908).

[13] New Hampshire "Board of Railroad Commissioners," created by the Act of December 25, 1844, Laws 1842-1847, Ch. 128 (P. L. 127); Massachusetts, Act of March 26, 1845, Laws 1843-1845 (P. L. 582).

did these specialized commissions, empowered to deal with but a certain type of utility, serve the purpose that, beginning in the year 1907, public service codes appeared which, carrying this method to its logical conclusion, provided for a single commission endowed with state-wide comprehensive powers of regulation over all types of public utilities.[14] It should be noted that in general these modern public service commission statutes are simply declaratory of the old common law standards, their chief purpose being to provide a new instrumentality and procedure through which that law can function for the better administration of justice in conformity with the needs of the actual every-day situation.[15]

Great as has been the improvement thus accomplished, present indications are that we must regard our modern commission regulation as but a transitory phase in the working out by experience of the most practicable and efficient method for safeguarding the public interest, and many experiments seeking the next step to that end are now in progress.[16]

Turning to the human elements in this field of public service, one cannot properly appraise the position of labor therein without a full understanding of the legal position of the public utility proprietor—the *entrepreneur*, as our economist friends term him—who, it must be remembered, may be an individual, a partnership, or a corporation.[17] What are his rights and obligations with respect to entering into or retiring from the public service?

It is commonly said that no one can be compelled to embark upon a public service enterprise. On the other hand, like trespass, it is not a matter of intention, and if one who consciously seeks to avoid engaging in a public service undertaking conducts a busi-

[14] Wisconsin Public Utilities Law, Laws 1907, Ch. 499; New York Public Service Commissions Law, Laws 1907, Ch. 429; Consolidated Laws, Ch. 48.

[15] Interstate Commerce Commission v. Cin., N. O. & Tex. Pac. Ry. Co., 167 U. S. 479 (1897); Chicago Junction Railway Co. v. U. S., 226 U. S. 286, 304 (1912); Coplay Cement Mfg. Co. v. Pub. Serv. Comn., 271 Pa. St. 58 (1921).

[16] See G. J. Thompson, The Next Step in Public Utility Regulation, WEST VIRGINIA LAW QUARTERLY, June, 1922.

[17] Perhaps today one should also include the so-called "Business Trust" as a type of public utility proprietor. But *Quaere*. See SEARS, TRUST ESTATES AS BUSINESS COMPANIES, Ed. 2, 1921; THOMPSON, BUSINESS TRUSTS AS SUBSTITUTES FOR BUSINESS CORPORATIONS, 1920.

ness which has become of such public consequence that it fulfills the legal test of public utility character, he is in fact a public service proprietor and subject to regulation.[18]

But he can by no means be compelled to continue indefinitely in that capacity; that would reduce him to involuntary servitude in contravention of his constitutional rights guaranteed in the Thirteenth Amendment to the United States Constitution. Since, however, he has undertaken to render a reasonable service to the public, he may not abandon that service except upon reasonable conditions, such as notice of his intention so to do, and after the lapse of that reasonable period of time which will afford the public a fair opportunity to take whatever steps may be necessary for the protection of the public need, by obtaining a substitute for the service or otherwise. A most important distinction is to be noted between this *bona fide* and actual retirement from the public service and a threat of retirement or suspension of service for ulterior purposes, for it is now clearly recognized that as long as the public utility proprietor has not fulfilled the requirements for legally abandoning the service he may be compelled to continue to furnish such reasonable service as lies fairly within the scope of his undertaking.[19]

The typical public service proprietor of the Common Law was the individual wagon or ship common carrier and the genial innkeeper, and although the public service law has expanded and become more efficient with the advent of the powerful corporate utility, its applicability to the individual has in no sense diminished. A few years ago it seemed as if the individual proprietor in this field would soon pass into history, but the inter-town auto-bus and auto-truck have brought him back with all his pristine common law attributes.

Why did the Common Law regulate this individual public utility proprietor? Certainly not simply because he was the *entrepreneur* or owner, for in that he stood in the same position as the

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[18] Munn v. Illinois, 94 U. S. 113 (1877); Van Dyke v. Geary, 244 U. S. 39 (1917); Producers' Transportation Co. v. Railroad Comn. of Cali., 251 U. S. 228 (1920).

[19] A discussion of the legal limitations safeguarding the public from abrupt cessation of the essential utility services will be found in a note entitled "Right of a Public Utility to Cease Operation and Dismantle its Plant without Consent of the State," 32 HARV. LAW REVIEW 716.

proprietor of any other business. The answer must be that under the actual conditions of the time and place it was he who held it in his individual power arbitrarily to control the satisfaction of the public need, since, flourishing in a period of ample labor supply, his will and not that of his employees was the dominating factor. Today the situation is exactly reversed. The proprietor has been so thoroughly regulated that the actuality is that the practically uncontrolled will of the public utility servant governs the destinies of our public service.

While some writers endeavor to distinguish the legal position of the proprietor from that of the employee engaged in rendering a public service, on the ground that the law of public utilities regulated the proprietor simply because he was the owner or *entrepreneur,* and that it was neither intended or adapted to the regulation of labor in the public utility field,[20] it is very clear that this law as administered in the courts has not been regarded as so restricted. This is demonstrated by the telephone patent cases,[21] in which it was held that one's rights may be subjected to public service regulation, although he is in no way connected with the ownership or management of the enterprise. There the patentee licensed the use of his patented equipment to public telephone companies upon the express condition that it remained his property and that its use should be denied to any person or company competing with the patentee or a specified telegraph company. Without hesitation the courts held such considerations void upon the ground that by licensing his patented equipment to the use of a public utility the patentee granted an interest therein to the public and became subject to public regulation to the extent of that interest.

Congress, by declaring in Sec. 6 of the Clayton Anti-Trust Act of October 15, 1914,[22] "that the labor of a human being is not a commodity or article of commerce," did not alter the well-settled law that labor is property,[23] therefore it seems directly within the

[20] 20 COLUMBIA LAW REVIEW 885 (Dec. 1920).

[21] State ex rel. Balt. & Ohio Teleg. Co. v. Telephone Co., 23 Fed. 539 (1885); Chesapeake & Potomac Telephone Co. v. Balt. & Ohio Teleg. Co., 66 Md. 399 (1887).

[22] 38 U. S. St. at L. 738.

[23] That the employee's labor, or his right to labor, constitutes "property" and is entitled to constitutional and judicial protection as such is a doctrine

basic principle of the law of public utilities laid down by the great Lord Chief Justice Hale: "that he who so uses his property as to make it of public consequence in effect grants to the public an interest in that use and to the extent of that interest must submit to be controlled by the public for the common good." In short, "when private property is 'affected with a public interest it ceases to be *juris privati* only.' "[24]

As a matter of law it has been very generally, and it is submitted quite properly, held that neither a threatened or actual strike of the employees of a public utility will excuse it from its obligation to use due diligence to perform the public service,[25] since to hold otherwise would take the regulation in this field out of the hands of the public and place it in those of the labor union, a private organization whose interests are directly opposed to the common

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supported by a long line of authorities. For instance, in Jones v. Leslie, 61 Wash. 107, 112 Pac. 81 (1910), the court said: "Can it be said with any degree of sense or justice that the property which a man has in his labor —which is the foundation of all property, and which is the only capital of so large a majority of the citizens of our country—is not property; or, at least, not that character of property which can demand the boon of protection from the government? We think not." In the same case the court quotes from the opinion of Lord Chief Justice Holt in Keeble v. Hickeringill, 11 East 574 (1701) (also reported in 11 Mod. 75): "Now, there are two sorts of acts for doing damage to a man's employment for which an action lies; the one is in respect of a man's privilege; the other is in respect of his property. In that of a man's franchise or privilege whereby he hath a fair, market, or ferry, if another shall use the like liberty, though out of his limits, he shall be liable to an action; though by grant from the king. But therein is the difference to be taken between a liberty in which the public hath a benefit, and that wherein the public is not concerned. 22 H. 6, 14, 15. The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases." See note to Jones v. Leslie in 48 L. R. A. (N. S.) 893.

That Sec. 20 of the Clayton Act is merely declaratory of the Common Law was specifically decided by the United States Supreme Court in American Steel Foundries v. Tri-City Central Trades Council (U. S.), 66 L. ed. 103 (1921). To the same effect, Stephens v. Ohio State Telephone Co. 240 Fed. 759 (1917).

[24] Waite, C. J., in Munn v. Illinois, 94 U. S. 113, 126 (1877), quoting from Lord HALE'S TREATISE, DE PORTIBUS MARIS, 1 HARG. LAW TRACTS 78.

[25] Geismer v. Lake Shore & Michigan Southern Ry. Co., 102 N. Y. 563 (1886); Stephens v. Ohio State Telephone Co., 240 Fed. 759, 775 (1917); Panhandle & Santa Fe Ry. Co. (Tex. Civ. App.), 235 S. W. 913 (1922).

welfare. That is exactly what happens, however, when the strike does materialize, for the fact is that in most cases the utility, in the absence of the injunctive aid of the courts, is actually unable to maintain the service.

Subjected to the pragmatic test of functioning amid actual conditions, it is obvious that the legal power of regulation of public utilities would afford but a negligible protection to the imperilled public interest if it were to be subordinated to a lawful right in the workmen engaged in rendering the service to defeat it at will by arbitrarily and in concert abandoning that service. It is unthinkable that the Common Law, formulated under conditions in which the regulation of organized labor as well as of business was the normal situation, would, in fixing the rights and duties of the public utility proprietor, entirely ignore the public utility employee, or subvert the public interest and imperil the very life of the community by a recognition of the latter's might to strike as an inalienable right. There seems no reason in the nature of things to justify the admitted right to regulate the local general truckman driving his one-horse truck and exempting from that power the engineer, fireman, and crew of the Chicago-New York through freight with their thousand-fold greater significance to the public welfare.

The far-reaching disaster consequent upon the strike of the employees of one of our great transportation systems has been vividly portrayed in the case of *Toledo, Ann Arbor, etc., Ry. Co. v. Pennsylvania Co.*,[26] an opinion noteworthy for its clear perception of the supremacy of the public interest: "The engineers of the Lake Shore & Michigan Southern Railroad operate steam engines moving over its different divisions 2,500 cars of freight per day. These cars carry supplies and material, upon the delivery of which the labor of tens of thousands of mechanics is dependent. They transport the products of factories whose output must be speedily carried away to keep their employees in labor. The suspension of work on the line of such a vast railroad, by the arbitrary action of the body of its engineers and firemen, would paralyze the business of the entire country, entailing losses and bringing disaster to thousands of unoffending citizens. Contracts would be broken, perishable property destroyed, the travelling public embarrassed, injuries

[26] 54 Fed. 746, at p. 752 (1893), opinion by Ricks, D. J.

sustained, too many and too vast to be enumerated. All these evil results would follow to the public because of the arbitrary action of a few hundred men, who, without any grievance of their own, without any dispute with their own employer as to wages or hours of service, as appears from the evidence in this case, quit their employment to aid men, it may be, on some road of minor importance, who have a difference with their employer which they fail to settle by ordinary methods." It will be recalled that these very conditions did come to pass in the railroad employees' "outlaw strike" of 1920, and again in the railroad shopmen's strike of the past summer.

Indeed, both the legislatures and the courts have long recognized that the public utility employee as well as his employer owes a direct duty to the public served. As early as 1877 we find legislation declaring it a criminal offense for an engineer or trainman to abandon or refuse to perform his duties in furtherance of a strike until his train has reached its scheduled destination, and similar statutes exist in a number of states.[27] This point was also strongly emphasized in the leading case just referred to, which was a proceeding alleging contempt of court against four engineers for violating an injunction restraining certain railroad companies, their officers and employees, from refusing to continue to serve without discrimination a connecting line on which a strike was in progress: "Holding to that employer, so engaged in this great public undertaking, the relation they did, they owed to him and to the public a higher duty than though their service had been due to a private person. They entered its service with full knowledge of the exacting duties it owed to the public. * * * In ordinary conditions as between employer and employee, the privilege of the latter to quit the former's service at his option cannot be prevented by restraint or force. * * * But these relative rights and powers may become quite different in the case of a great public corporation, charged by the law with certain great trusts and duties to the public. An engineer and fireman, who start from Toledo with a train of cars filled with passengers destined for Cleveland, begin that

[27] The Pennsylvania Act of March 22, 1877 (P. L. 14). An enumeration of the states possessing similar statutes will be found at page 45 of COMMON AND ANDREWS, PRINCIPLES OF LABOR LEGISLATION (1916).

journey under contract to drive their engine and draw the cars to the destination agreed upon. Will it be claimed that this engineer and fireman could quit their employment when the train is part way on its route, and abandon it at some point where the lives of the passengers would be imperiled and the safety of the property jeopardized? The simple statement of the proposition carries its own condemnation with it. The very nature of their service, involving as it does the custody of human life and the safety of millions of property, imposes upon them obligations and duties commensurate with the character of the trusts committed to them."[28]

Nearly a quarter of a century later, in the well-known case of *Wilson v. New*,[29] which upheld the constitutionality of the Adamson Law,[30] the legislation forced through Congress by the railway brotherhoods upon threat of a nation-wide strike, and fixing the standard wage-day at eight hours or one hundred miles, with time and a half for overtime, we find the United States Supreme Court very definitely treating the proprietor and the employee in the public utility field as equally responsible to the public for the continuity and efficiency of the service, and subject to regulation to that end. Referring to the employee, Mr. Chief Justice White declared:

"Here again it is obvious that what we have previously said is applicable and decisive, since whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them, and by concert of action to agree with others to leave on the same conditions, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest and as to which the power to regulate commerce possessed by Congress applied, and the resulting right to fix in case of disagreement and dispute a standard of wages, as we have seen necessarily obtained.

"In other words, considering comprehensively the situation of the employer and the employee in the light of the obligations arising from the public interest, and of the work in which they are engaged

[28] Compare the abandonment of transcontinental passenger trains amid the burning deserts of the Southwest and owing to a sympathetic strike of their crews during the railway strike of the past summer, referred to by President Harding in his special message to Congress August 18, 1922.

[29] 243 U. S. 332 (1917).

[30] 39 U. S. St. at L. 721.

and the degree of regulation which may be lawfully exerted by Congress as to that business, it must follow that the exercise of the lawful governmental right is controlling. * * * The capacity to exercise the private right free from legislative interference affords no ground for saying that legislative power does not exist to protect the public interest from the injury resulting from the failure to exercise the private right. * * * And this emphasizes that there is no question here of purely private right, since the law is concerned only with those who are engaged in a business charged with a public interest, where the subject dealt with as to all the parties is one involved in that business, and which we have seen comes under the control of the right to regulate to the extent that the power to do so is appropriate or relevant to the business regulated."

And note the words of Mr. Justice McKenna, concurring: "* * * There well might be hesitation to displace him [the employee as judge of his wage value] and substitute the determination of the law for his action. I speak only of intention; of the power I have no doubt. When one enters into interstate commerce, one enters into a service in which the public has an interest, and subjects oneself to its behests. And this is no limitation of liberty; it is the consequence of liberty exercised, the obligation of his undertaking, and constrains no more than any contract constrains. The obligation of a contract is the law under which it is made, and submission to regulation is the condition which attaches to one who enters into or accepts employment in a business in which the public has an interest."

These modern declarations of the fundamentally relational character of the law of public service enterprises, and of the obligations incident to the status of employee therein, although made with reference to a constitutional question involving the interpretation of the Commerce Clause and the Fifth Amendment of the federal Constitution, but enunciate, as we have seen, primal common law principles equally applicable throughout the public utility field.

Two comparatively recent common law decisions in New York illustrate the practical as well as legal futility of attempting to distinguish between the public utility proprietor and the public utility employee in respect to their obligation to the public to

whom both in common, in the nature of things, must owe the service.

In one case[31] a public trucking company whose employees had struck for the closed shop sought an injunction against the employees of certain common carriers by steamship (freight clerks, freight handlers, checkers, weighers, and longshoremen) to restrain them from boycotting goods handled, or to be handled, by its trucks and to protect the right of itself and its shippers to the public service. The court, however, dismissed the temporary injunction which had been granted, and was effecting the desired result, and denied the relief prayed for, upon the ground that the union employees of a common carrier had the lawful right to advance the cause of union labor even to the extent of refusing to perform the public service which they had undertaken to render by boycotting the goods of the innocent shipping public.

In a separate suit[32] brought by the same trucking company to enjoin the connecting common carriers from unlawfully discriminating against it in service and facilities, the court, having just upheld the legal right of the employees of said carriers to threaten to strike or to strike if the service was rendered, quite logically, although contrary to the overwhelming weight of authority,[33] permitted the defendant carriers to justify the refusal to perform their public duty by reason of the threatened strike. The decision was put upon the theory that under the circumstances the denial of service did not constitute an unreasonable discrimination, since practically all the workmen engaged in this branch of the transportation field were unionized, hence the court assumed that an attempt to hold the employers to the performance of their legal duties would result in a complete tie-up of the port. Not only does it seem highly improper for the court to acquiesce in an assumption that the law will not be obeyed, and, therefore, to discard the law, but in the principal case that assumption appears to have been wholly unwarranted by the facts. We have the words of the court itself in the first of these cases proving that the preliminary injunc-

[31] Reardon, Inc., v. Caton et al., 189 N. Y. App. Div. 501, 178 N. Y. Supp. 713 (1919).

[32] Reardon, Inc., v. International Mercantile Marine Co., 189 N. Y. App. Div. 515, 178 N. Y. Supp. 722 (1919).

[33] See note 25, *supra*.

tion had been properly obeyed, for in the majority opinion the point was carefully made that obedience to said injunction should not be construed as a waiver by the unions of their lawful right to boycott said goods, on the ground that it was economically impossible for the employees *bona fide* to retire from the employment in which they were threatening to strike.[34] The effect of these two New York cases taken together was the complete subjugation of the law of public utilities, the public service, and the public welfare to direct regulation by the arbitrary and selfish might of the partisan, private labor organizations.

The crux of the whole question is the supremacy of the law—a challenge of the sovereign power of the state.

As was said by another New York court in a later case[35] which distinguished the two cases above mentioned and repudiated their pernicious reasoning: "It does not lie with union leaders to lay down the proposition that the last word in deciding what merchan-

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[34] Thus, Kelly, J., said, page 501: "We know that longshoremen and dock laborers who are not regularly employed, and who are paid by the hour, cannot quit their work because of their necessities. * * * It appears that in this case the defendants have continued to work because of these considerations and in obedience to the preliminary injunction of the court, which gives to the plaintic the full relief to which it might be entitled after trial."

[35] Fawcett, J., in Burgess Bros. Co. v. Stewart et al., 112 N. Y. Misc. Rep. 347, 184 N. Y. Supp. 199, 207 (1920), affirmed in 194 App. Div. 913, 185 N. Y. Supp. 85 (1920). In that case certain ocean-going common carriers refused through their terminal agencies to receive and carry the lumber which the complainant company presented for shipment, or even when presented for shipment by purchasers from said company, owing to a threatened strike by their freight handlers, clerks, etc., in sympathy with a strike of complainant's truck drivers, chauffeurs, etc., to compel the adoption of a closed shop. The true situation is well summed up in this opinion (p. 208): "Likewise, the fact that the fear of a strike may have alone induced the carriers in this case to grant the union's request that a crime be committed, does not constitute a defense. Undoubtedly, the carriers want the plaintiff's business, but they also want to agree with their employees. When they had to choose between the two, they decided to join with their employees and violate the law of the land by discriminating against the plaintiff and even violating contracts for transportation of plaintiff's goods * * * (p. 209) It seems that either the relief must be granted in these suits or the common carrier's duty to serve the public is annihilated when unions choose to discriminate."

dise shall or shall not be transported should vest exclusively in them. * * *"[36]

And note the words of Mr. Justice Brewer in the famous case of *In re Debs*[37]: "If a State with its recognized power of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association has a power which the state itself does not possess?"

It is the age-old problem whether individuals or groups in the community, economically and politically powerful enough to feel secure in the sufficiency of their own strength to safeguard what they have and to secure what they want, shall be allowed to settle their disputes by "trial by battle," or to wage wars of conquest amidst the public peace, to the imminent danger, and almost invariably to the actual injury, of the innocent bystander—the general public.[38] In a word, the short and ugly question is: Shall labor and capital be permitted to maintain a guerilla warfare against each other, and both against the helpless public, under the jungle rule of survival of the wickedest? If our civilization is to progress there is but one answer. "This rule antedated law, it is wholly subversive of law, and such a rule as this cannot exist in a country ruled by law."[39] To quote again from Mr. Justice Brewer's great opinion in the *Debs* case,[40] "* * * It is a lesson which cannot be learned too soon or too thoroughly that under this government of and by the people the means of redress of all wrongs are through the courts and at the ballot-box, and that no wrong, real or fancied, carries with it legal warrant to invite as a means of redress the coöperation of a mob, with its accompanying acts of violence."

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[36] "It comes simply to the question, shall the law of an irresponsible trades union, or, shall the organic law of a free commonwealth prevail? We answer that every court of the commonwealth is bound to maintain the latter in letter and spirit." Dean, J., in Erdman v. Mitchell, 207 Pa. 79, 94 (1903).

[37] 158 U. S. 564, at page 581 (1895).

[38] See William Reynolds Vance, "The Kansas Court of Industrial Relations and its Background," 30 YALE LAW JOURNAL 456 (1921), which contains an excellent historical résumé of the long struggle for the supremacy of law and order.

[39] Faris, D. J., in Langenberg Hat Co. v. United Cloth Hat and Cap Workers, 266 Fed. Rep. 127, 129 (1920).

[40] Page 599. See note 36, *supra*.

Driving home this axiomatic principle in a case of aggressive interference by telephone strikers with the performance of the public service by the utility, Killits, D. J., said in *Stephens v. Ohio State Telephone Co.*[41]: "Two maxims which have much the same meaning are universally treated as controlling all legislation and as limiting all personal rights. They are *'Salus populi est suprema lex,"* and *'Salus reipublicae suprema lex.'* Liberally translated, they mean that the public welfare is the first and supreme consideration. They are the law of all courts and all countries. Individual rights universally are, and plainly must be, subordinated to the public good, and of this principle we have many applications, of which the superior quality of the public's interest in the service of a public utility vitally conserving the public welfare is one. Congress must be considered to have legislated in the light of this principle [when enacting the Clayton Act of October 15, 1914, containing in Sec. 20 the so-called 'Labor's Bill of Rights'[42]], which must be resorted to as one essential criterion of interpretation of the acts of all legislatures."

In the recent celebrated case of *State ex rel. Hopkins v. Howat,*[43] the supreme court of Kansas declared it to be not only the right but the duty of the courts to grant an injunction at the suit of the state as the protector of the general public welfare to prevent the calling of a strike in the coal mines of the state which would result in the stagnation of all industry, the stopping of public utility service, and untold suffering in hospitals, charitable institutions, and in the homes of the people. And this in spite of a statute which prohibited the use of the injunction in labor disputes, the court quite correctly taking the view that such an emergency situation, threatening the very functioning of government, was not within the intent and purpose of said act. When the public life is threatened the state as *parens patriae* must be in a position to resort to any and all legal instrumentalities which will promptly and effectually establish its supremacy and maintain the public peace under conditions of law and order.

The history of the law of public utilities in this country during

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[41] 240 Fed. 759, 775 (1917).
[42] 38 U. S. St. at L. 738.
[43] 109 Kan. 376, 198 Pac. 686 (1921).

the past seventy-five years consists principally in the reassertion of the power of the law to protect the public interest by subjecting to public regulation and control the great corporate public service proprietors in spite of the extensive economic and political influence they wielded through their enormous mobilization of capital. This task has been pretty thoroughly accomplished. There remains the decisive establishment of the reign of law and order over that of might and riot with reference to the powerful labor organizations in the public utility field.

That they have so long managed to ward off the law is directly attributable to the catch phrase "the inalienable right to strike." Possessing the connotation of a Bill of Rights, it was popularly accepted as a stirring declaration of one of the fundamental prerogatives of a free-born American citizen. Few questioned it; none dared deny it.[44] An illustration of the doctrine of this expression carried to its logical conclusion in time of war when the national life was at stake is seen in the case of *In re Claim of Employees of the Minneapolis Steel & Machine Company.*[45] There, in upholding a claim for back wages based upon a contract forced from the government by threat of a strike at a critical stage of the conflict, and in violation of an existing wage agreement, the Contract Adjustment Board of the War Department said in part: "Relying on the assurance of the government, the claimants remained at work instead of striking. The right to strike for higher wages, even when the country is in the throes of war and the lives of many soldiers at the front may be dependent upon continuous work, has never, so far as we know, been questioned. To refrain from striking may, therefore, be a valid consideration for a promise." Of course, this vicious decision was promptly reversed on appeal,[46] but the fact that men in authority could bring themselves to give full legal effect to this *de facto* power of the workmen to strike, and in the face of their own recital of the cold-blooded consequences of this uncon-

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[44] See W. A. Sutherland, "The Menace of 'Counter' Phrases," 28 W. VA. LAW QUARTERLY 179 (1922).

[45] 6 War Department Decisions, Contract Adjustment Board, 835 (1920). Reversed by Appeals Section, War Department Claims Board, 7 War Department Decisions.

[46] War Department Claims Board 545 (1920).

scionable and disloyal exercise of that power, demonstrates the strength with which this slogan of labor has gripped the people. On analysis, however, this phrase will be seen to confuse the constitutional right actually and *bona fide* to retire on reasonable terms from a particular service or vocation with the alleged right to strike. In fact, the strike is quite a different thing. It is an abrupt, arbitrary and concerted cessation of work, not for the purpose of quitting the employment, but obviously and admittedly with the definite object of continuing in that very employment upon the strikers' own terms.[47]

The courts have long appreciated the importance of this distinction, and it has come to be the determining factor upon the question of the constitutionality of contempt proceedings for violation of an injunction against the employees of an interstate common carrier interfering with the continuous performance of the public service of interstate transportation, or with the operation of railroads in the hands of receivers. We find the United States Supreme Court, for instance, holding in the case of *In re Lennon*[48] that a railroad engineer who struck and refused to handle cars from a connecting line on which a strike was in progress in violation of an injunction was properly punished for contempt, as he was not *bona fide* exercising his constitutional right to permanently retire from the service, the evidence clearly showing that he intended all along to continue in the employment when his terms were met.

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[47] This was well brought out by Burch, J., in State ex rel. Hopkins v. Howat, where, in speaking of the alleged unlawful interference of the statute with the constitutional right to strike, he said (p. 699, Pac. Rep.): "It is said that a man is a slave unless he may quit work. The assertion is ambiguous. If it refers to striking, which is not an abandonment of the employer's service at all, it is untrue. A train crew may rightfully be forbidden to leave a trainload of passengers between stations. Probably identification of striking with leaving the employer's service under circumstances not so exceptional is intended. In that sense the assertion is an abuse of language. * * *" An excellent discussion of this subject may be found in D. F. WILCOX, THE ELECTRIC RAILWAY PROBLEM (1921), Ch. XLV, "The Right to Strike," p. 542.

But see Birmingham Trust & Savings Co. v. Atlanta, etc., Ry. Co., 271 Fed. 743, to the effect that a strike, even though lawful, terminates the employment.

[48] 166 U. S. 548 (1897).

Viewed from the constitutional standpoint, the recent census statistics portraying the swing of the balance of population from country to centers of industry is most significant. A tradeless specialist of some minute operation, the modern workman, under our highly organized system of division of labor, is practically bound to the enterprise, and the actuality is, as we have seen, that in our complex and rapidly solidifying society it is becoming economically impossible for large bodies of such employees to *bona fide* retire from the employment in which they threaten to strike. Consequently, it is quite clear that no constitutional question of involuntary servitude is really involved in the modern strike problem.

The law and the courts must, however, take cognizance of this *de facto* dependence of the employee upon the particular employment, and, fortunately, no branch of the law is better fitted for ready adjustment to meet that situation than is the law of public utilities. Just as the public service proprietor is only bound by law to do that which is reasonable, so the public utility employee, standing as he does, from the viewpoint of the paramount public interest, in the same position actually and legally as his master, can but be required to furnish a reasonable service, at reasonable rates, and under reasonable working conditions.[49] The real problem is to see to it that the public utility law is really administered in such

[49] "Just as the carriers are bound to serve the public indiscriminately, so are their employees—and rightly so, for if the inhibition against discrimination did not apply equally to the employees as well as against the carriers themselves the protection afforded the public would be negligible. It does not follow, however, that the relief sought by the plaintiff would impose involuntary servitude upon members of the defendant unions. No employee is forbidden to quit work by the injunction or to accept better employment if he may find it, or to change his position as often as he sees fit. * * * The law cannot force any man to remain in the service of the public, but he has certain obligations when engaged in public service and is bound by public statutes as well as his employer. While it is indisputable that a man may enter any vocation that he chooses, yet if he sees fit to select a field indissolubly linked with the rights of the public, such as that of common carrier, he must subserve his own rights to that of the public welfare and must at all times stand ready and willing to assume all of the exacting duties which he knows are owed the public. When he enters the public service he impliedly acquiesces in assuming all of these obligations. He must either get out of the transportation business or serve all persons alike. * * * This is a case where the court may properly say to the members of these defendant unions: 'You are not constrained to remain in the employ

a fair and fearless manner that it will function to these ends.

Here again we encounter the same difficulty which led to the establishment of commission regulation of the public utility enterprise, the want of power in the courts to lay down rules for future guidance, since they were limited in jurisdiction to passing upon the lawfulness of past conduct. So labor in the public utility field and elsewhere, unable to obtain an authoritative declaratory ruling upon the justness of its demands, felt that the courts were either inadequate or unwilling to protect its interests; and that being thus in a sense outside the protection of the law it must rely on the primitive weapon of force to safeguard its legitimate welfare. The law recognizing this administrative defect was very tolerant of this right of self-help and adopted in practice a hands-off policy that encouraged the general impression among both workmen and lay public that there was such a thing as an inalienable right to strike. What has been the result? That the labor leaders go about their arrangements for a strike without a thought that the courts are open to them and though the cause of controversy may be a most simple justiciable matter.[50]

Obviously, this must be remedied by providing a tribunal that will assert the supremacy of the state as the guardian of law and order in behalf of the general public interest. A peaceable and legal procedure of a simple and summary nature must be devised

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of common carriers, but if you choose so to do your duty is to serve all members of the public alike, and you must handle the lumber of this plaintiff as well as that of any other members of the community.' Matter of Lennon, *supra.*" Fawcett, J., in Burgess Bros. Co. v. Stewart, 184 N. Y. Supp. 199, 207 (1920).

[50] This is forcibly demonstrated in the testimony of the union leader Howat in State ex rel. Hopkins v. Howat (note 37, *supra*), as set forth in the opinion of the Kansas supreme court. Referring to the strike of 1919, the court pointed out that it arose over a simple claim for $225 back pay which a boy asserted he was entitled to as he had discovered that he became 19 years of age and, therefore, a full-fledged miner some months earlier than he originally represented in stating his age. Portions of Howat's testimony follow:

"Q. Well, don't you know that if this boy had a claim for wages under a contract that you could recover it in court? A. No; I didn't know it. We never have settled any cases that way. * * *

"Q. You think the boy couldn't collect the money in the courts? A. I couldn't say whether he could or not. I never tried it, and, anyway, we

by which the employee engaged in the public utility field may have an opportunity to present his just claims and grievances before an impartial court possessing, by constitutional amendment if necessary, power to administer preventive justice by laying down rules of reasonable conduct in advance, as well as the usual judicial function of compensating or punishing for an injury committed. It would seem advisable not to vest the equitable remedy of injunction in this court, but to empower it to apply to the established courts for this relief, thus insuring a preliminary judicial review of the need of resort to this stringent remedy.

However, the courts as now constituted are amply empowered under the common law of public utilities to protect the public from partial or total deprivation of these vitally necessary services with-

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have a contract which provides for it and we wasn't obliged to go to court.* * *

"Q. You don't go into court? A. No, sir; neither here nor in the other districts. * * *

"Q. You didn't read the injunction? A. No; never did. * * *

"Q. You don't recognize courts in the matter of settlement for wages? A. No, sir; we have a contract that covers that. * * *

"Q. You don't recognize that contracts are made to be enforced in courts, then ? A. No, sir." (P. 698, Pac.)

The testimony of President Gompers of the American Federation of Labor before the Lockwood Committee of the New York Legislature establishes that this represents the typical attitude of union labor towards the courts. See 4 LAW AND LABOR 113 (May, 1922).

WILCOX, THE ELECTRIC RAILWAY PROBLEM, p. 543, points out that union labor regards itself as segregated from the general community, and therefore that even our government "of the people, by the people and for the people" is "something not theirs, but their enemy's," and adds that "The labor problem cannot be solved until government wins the support of labor; until labor ceases to be an unassimilated, undigested lump in the political stomach of the community."

That a contract among those who refuse to recognize the sanction of the law is "a mere scrap of paper" is exemplified in the case of Howat v. Lewis et al., in the Circuit Court of Jackson County, Missouri, in which Howat sought to enjoin the international officers of the United Mine Workers from removing him from office as president of District 14, pursuant to action taken at the international convention of said union, for his disobedience in calling certain strikes in Kansas in 1921 in violation of contracts with the operators providing for arbitration; but the court denied relief upon the ground that one whose alleged equity rested upon disregard of contract obligations did not come into court with clean hands. 4 LAW AND LABOR 40 (Feb. 1922).

out reasonable notice, and to that end may enjoin the employees of a public utility enterprise from exercising even the constitutional right *bona fide* to quit except upon such reasonable conditions that steps may be taken to provide for the public need, and, further, from refusing to perform the service so long as they continue in the employment. Another sanction, the importance of which seems to have been generally overlooked, is the liability of the labor organization and its members to respond in damages to the individual members of the public for the injuries inflicted by reason of their wrongful failure to maintain the efficiency and continuity of the public service.[51] Whether we consider this from the viewpoint of contract or of relationship, it would seem to fall within the elementary tort principles applied in a number of American and English cases holding labor unions and their members liable in damages for violation of statutory rights;[52] for interference with the relation of master and servant, between others;[53] for inducing breach of contracts;[54] and for destruction of property of the employer and third parties in case of a strike.[55]

In spite of the fact that both principle and authority support the right of regulation of labor in the public utility field, the courts, still influenced by the Kantian abrecadabra, "individual free will," which dominated the juristic thought of nineteenth-century Amer-

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[51] A recent case before the Pennsylvania courts seeking to enforce the liability of labor unions engaged in public utility employment to respond in damages to members of the public injured by the tie-up of street railway service by a strike, is that of A. E. Anderson, for himself and others, v. Amalgamated Association of Street and Electric Railway Employees et al., 76 Pa. Super. Ct. 556 (1921). The plaintiff alleged damages to himself of 78 cents and damages to other members of the public, such as big employers of labor, department stores, etc., in excess of $2,000,000. The case went off on a point of procedure, leaving still open the real question involved.

[52] Lawlor v. Loewe, 235 U. S. 522, 534 (1914); Toledo, Ann Arbor, etc., Ry. Co. v. Pennsylvania Co., 54 Fed. 730, 737 (1893).

[53] Auburn Draying Co. v. Wardwell, 227 N. Y. 1; 124 N. E. 97, 99 (1919); Brennan v. United Hatters, etc., 73 N. J. L. 729, 65 Atl. 165 (1906).

[54] Quinn v. Leathem (1901), A. C. 495; South Wales Miners' Federation v. Glan Morgan Coal Co. (1905), A. C. 239, 244.

[55] United Mine Workers of America v. Coronado Coal. Co., 258 Fed. 829 (C. C. A. 1919); United Mine Workers of America v. Coronado Coal Co., — U. S. —, 66 L. Ed. Adv. Op., p. 643, 655 (1922).

ica, hesitate to revive the exercise of this power, feeling it to be of such vital and far-reaching significance that the initiative should come from the representatives of the people—the legislature. When we stop to realize how delicate must be the balancing of the highly conflicting interests here involved, it becomes obvious that in no branch of the law is the sanction of public sentiment more essential to its successful operation. Therefore, considering the actuality that to both labor and the uninformed general public this must appear to be an extension of governmental control into new fields, it would seem best, in an abundance of precaution, the situation permitting, that the courts, already laboring under the displeasure and suspicion of the working classes, avoid further odium by waiting until they can take this step under a legislative fiat, although, as will probably be the case, that is but declaratory of the common law.[56] This was the exact situation which confronted President Harding in the coal and railway strikes of the past summer, and his patient wisdom in seeking the mandate of the people before resorting to drastic exercise of the executive power probably averted a serious political crisis.

Naturally, the question arises, what is being done to meet this long-standing and obvious danger to the general public interest?

For the most part, we are still aimlessly endeavoring to treat both capital and labor as gentlemen outlaws whose innate altruism will lead them to submit their differences to the good offices of innocuous state boards of arbitration, conciliation, or mediation for the ultimate benefit of an apparently helpless public. Possessing neither the power to compel arbitration of the incipient dispute nor to enforce their findings and awards in such cases as are submitted to them, they have proven of no greater efficiency than did the Hague Peace Tribunal among sovereign outlaws.

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[56] While undoubtedly the public utility acts in most states are broad enough, both in terms and in spirit, to support commission regulation of labor engaged in the public service as well as the proprietor, for example, when necessary to insure the performance of a reasonable service, yet the commissions have acted upon the theory that they possessed no such power in the absence of an express provision specifically conferring it upon them. See editorial upon "The Regulation of Labor," advanced sheets, P. U. R. 1921 E., Dec. 22, 1921. Also, WILCOX, THE STREET RAILWAY PROBLEM, Ch. XLIV." Labor's Public Relations Recognized," p. 537.

Our heritage from the federal War Labor Administration has been a much heralded new method of organization for what is in reality the voluntary arbitration board. The charm of the plan lies in its plausibility. Life is a conflict of the needs (translated interests) of the different groups that make up the community. In the industrial field there are three groups—labor, capital, and the public. It follows that no tribunal representing less than all these groups can or will do justice; therefore, every board which attempts to deal with this problem must have equal representation from each group, and lo! the difficulty is solved. The theory is that the paramount public interest will be duly safeguarded, inasmuch as both capital and labor are also identified with the public, hence on any particular question one or the other will naturally vote with the public representatives. In other words, the public group always stands to win by the counter-pairing of the other two groups with it. But what of the actuality? Contrary to the logic of the theory, the fact is that capital and labor have discovered many interests in common to the public detriment. Neither wishes to submit to legal regulation its relations with the other, but both prefer to remain outside the law and to settle their controversies by private conference, and not infrequently at the expense of the public,—the employers of both labor and capital.[57]

The chief weakness of the scheme is that it merely centralizes and intensifies the conflict of these antagonistic interests. The representatives of each group on the board are there to take orders from and stand by their constituents,[58] and with an unorganized public possessing no systematic method of ceaselessly pressing cleverly prepared demands, as do the other groups, it stands to reason that eventually the public will be the loser. In substance, this is simply a tri-partisan bargain-counter, and in that respect it lacks

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[57] "Labor shares with capital the reluctance to admit that upon devoting itself to a public service it thereby divests itself of certain rights which it would otherwise enjoy. Labor, in the electric railway industry, like capital, objects to being regulated and declines to accept in good faith the full consequences of employment in a public service." WILCOX, THE STREET RAILWAY PROBLEM, Ch. XLV, "The Right to Strike," p. 548.

[58] "In actual practice, a board of arbitration is too frequently a jury packed on both sides." Burch, J., in State ex rel. Hopkins v. Howat, 109 Kan. 376, 198 Pac. 686, 698 (1921).

the disinterested umpire element, the essence of true arbitration. As a recent writer has well pointed out in discussing the subject of labor in the public service enterprise: "This being 'affected with a public interest' is what differentiates public utilities from ordinary private industries. It is the increase in the consumer's interest that disturbs the old tri-partite equilibrium and tends to make the interests of the patrons of the utility preponderant."[59]

The United States Railroad Labor Board established by Sec. 304 of the Transportation Act of 1920 to deal with labor controversies between interstate carriers and their employees and subordinate officials is of this tri-partite form of organization. While unfortunate in emphasizing the public interest simply as another competitive element rather than its paramount and superior character, embodying within itself both the other interests, and in being an obvious political makeshift, this act does point to real progress in its attempt to provide through the Labor Adjustment Boards and the Railroad Labor Board tribunals in which the workman may find the opportunity to air his grievances as they arise and to receive that fair justice which will command the support of the public opinion of his fellow citizens. Having achieved this, the old excuse for resort to the primitive weapon of the strike is removed, and labor, thus fully protected under the regime of law and order, must submit to the outlawry of the strike and its relegation to the limbo of the duel and the vigilance committee. Just at present this moderate policy of public guidance of labor controversies may be best adapted to meet the transitional period of the education of labor to the advantages and necessity of the supremacy of law and order in the field of industrial disputes.[60] At least, the labor provisions of the Transportation Act of 1920 may serve the useful purpose of gradually introducing the employees of our inter-

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[59] WILCOX, THE STREET RAILWAY PROBLEM, p. 562.

[60] " * * * it cannot for a moment be conceded that labor's right to strike is paramount to the public's right to have local transportation go on without interruption. At the same time, punitive legislation is useless unless it is effective, and in matters like this it can hardly be effective unless accompanied by preventive legislation that is effective in the first instance, and it may be that proper preventive measures, while in theory preparing the way for and justifying punitive measures, will in fact make the latter unnecessary." WILCOX, THE STREET RAILWAY PROBLEM, p. 563.

state railroads to the idea of public regulation, and it must be conceded that the sanction of a focussed public opinion has up to the present proven more efficacious than seemed probable when the compulsory features of the bill were deleted in congress.[61]

While the federal government was thus temporizing with the inevitable, the state of Kansas boldly met the ultimate issue by the enactment of the Industrial Relations Court Law of 1920,[62] which abolished the existing Public Utilities Commission and placed the general regulation of public service enterprises, and specifically the relations between the proprietors and their employees, within the jurisdiction of the new court. This progressive legislation was the spontaneous reaction of an outraged public that had but recently experienced labor's challenge of the supremacy of law and order, and had only maintained the continuity of the most essential public services and averted bitter suffering through the shortage of food and fuel by the patriotism of thousands of volunteers from all walks of life who met the state-wide coal miners' strike of the early winter of 1919-1920 by going into the mines under the protection of the rifles of the militia and digging the coal that saved the community.[63] Little wonder that after such an experience the people of Kansas resolved to tolerate nothing short of the unequivocal supremacy of law and order and the common-weal above the selfish interest of any class.

To accomplish this the legislature, turning to the fundamental bases of the common law, declared all industries and employments relating to food, fuel, and clothing, and all types of business directly affecting the living conditions of the state to be affected with a

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[61] A strong editorial in 52 CHICAGO LEGAL NEWS 381 (June 24, 1920) criticised the action of the United States House of Representatives in forcing out of the Esch-Cummins Railroad Bill the anti-strike clauses inserted by the Senate, which prohibited striking in interstate transportation on penalty of $500 fine or six months' imprisonment, or both. The editor commended the remedy advocated by the United States Chamber of Commerce, that strikes in the public utility field be explicitly forbidden by law under such penalties as would compel resort to suitable tribunals to be provided for the prompt adjudication of labor disputes in this field.

[62] Laws of Kansas, Special Session, 1920, Ch. 29.

[63] The conditions which led to the enactment of this statute are graphically depicted in the opinion in State ex rel. Hopkins v. Howat, 109 Kan. 376, 198 Pac. 686, 691 (1921).

public interest, and therefore that they should be administered as general public utilities. It then provided a tribunal designated as the "Industrial Relations Court" to put this new state policy into effect. Whether on legal principles this is a real court of law or merely in substance a commission or administrative body,[64] the use of the appellation "court" is of value in that it not only fits into the trend of the historical development of such tribunals into true courts, though of special jurisdiction, but serves most admirably to emphasize and bring home to the average citizen its paramount and sole allegiance to the sovereign people of the state. Indeed, the Kansas supreme court has frankly stated that the word "court" was applied to this new tribunal "merely as a matter of legislative strategy."[65]

The "court" thus created is made primarily responsible "for preserving the peace, protecting the public health, preventing industrial strife disorder and waste, and securing the regular and orderly conduct of the business directly affecting the living conditions of the state, and in the promotion of the general welfare." To that end, it was empowered to supervise, direct and control the operations of industries and employments relating to food, fuel and clothing, and of all public utilities, and to do all things needful for the proper and expeditious enforcement of the law. If either or both parties to a controversy refuse to obey the orders of the court to the endangering of the continuity and efficiency of the service to the public, the state may take over such industries and operate them. Striking is made unlawful and punishable by a fine of $500 or six months' imprisonment, or both, while to call a strike or to foment one is declared a felony and may lead to a fine of $1,000 and five years in the penitentiary.

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[64] In Howat v. Kansas, — U. S. —, Adv. Ops. 1921-22, p. 322 (decided March 13, 1922), the United States Supreme Court, in dismissing Howat's writ of error on the ground that no federal question was involved, since the injunction for violation of which he had been committed for contempt was not based upon the Industrial Relations Court Act, but upon the power of a constitutional court of general jurisdiction to issue injunctions at the suit of the state on principles identical with those applied in abatement of public nuisances, referred to the Industrial Relations Court as "an administrative tribunal," a "board miscalled a court."

[65] 198 Pac. at p. 694.

On the other hand, the fair and reasonable interests and rights of labor are carefully protected. While the act recognizes the right to make and perform contracts of employment, it specifically provides that if such a contract is found by the court to be unfair during the pendency thereof the court may order it to be changed or amended, thus quite properly taking cognizance of the inefficacy of the general principles of our contract law in these typically common law relational situations. There is nothing unique in that, however, for it falls directly in line with all our modern employment legislation.

Although it was deemed advisable, after a year's experience, to restore the Public Utilities Commission[66] to supervise the general relations between the ordinary public service companies and the public, the Industrial Relations Court has, in spite of the strenuous opposition of both labor and capital,[67] made an enviable contribution toward subjecting to the orderly processes of the law labor controversies in those enterprises upon which our modern society is so peculiarly dependent. Whether this paramount public interest is to be protected through one type of instrumentality or another, that it shall be adequately safeguarded is absolutely necessary to the progress and development of our civilization, and those who seek to maintain the outlaw situation of the past are simply casting themselves against the inevitable. The future of the Kansas experiment will depend largely upon the judges who administer its broad powers. That bench should command the highest ability, integrity and independence to be found at the bar of the state.

It has been said that this Kansas Act is but another form of compulsory arbitration,[68] and, perhaps, in a sense that is true. How-

[66] Kansas Laws, 1921, Ch. 260.

[67] The united stand of labor and capital against the Kansas Industrial Court Act is referred to in the opinion in State ex rel, Hopkins v. Howat (198 Pac. at p. 701): "Eminent counsel, representing employers of labor in industries affected by the act of 1920, were invited to file briefs in this case, and the court gratefully acknowledges the benefit of their very candid and very forceful criticisms of the act. Their chief contentions, including the *in terrorem* argument that constitutional government is jeopardized and all the affairs of life may be regulated if the Munn case be applied to any new subjects, are * * * fully met by the decision in the German Alliance Insurance Co. case" (233 U. S. 389).

[68] Taft, C. J., in Howat v. Kansas, note 62, *supra*, at p. 323.

ever, it is more nearly related to those statutes introduced by the Canadian Industrial Disputes Investigation Act of 1907, providing for governmental supervision of collective bargaining, which declared a sudden change of terms, or a strike or lockout without sufficient notice, unlawful in those industries affected with a public interest, such as public utilities and mines. The Colorado Industrial Commission Act[69] of 1915 is of this regulatory type. Indeed, the Canadian Act has been the model of much labor legislation in the United States, England, and the Australasian countries.

The regulation of labor in the public service field under the principles of reasonableness which make up the law of public utilities, and thereby bring it into alignment with the proprietor's present position, will not involve the difficulties of enforcement so frequently predicted. The ultimate sanction of all law is public opinion, and to win that degree of public support which no labor or employing group would dare to disregard it is only necessary to have judges who will inherently live up to that standard of justice embodied in the instructions of an ancient Chinese emperor to his judiciary: "The judgments of honest men alone can attain justice. Remember that it is only when you judge in accord with reason and justice that your decision will be willingly accepted by the parties and gain popular approval."[70] Given those premises, who can imagine any group in the community successfully evading or refusing that obedience to the law which will secure the public interest in the continuity of the essential public utility services?

No better epitome of the problem could be found than that contained in the closing paragraph of the dissenting opinion of Mr. Justice Brandeis in the recent case of *Duplex Printing Co. v. Deering* in the Supreme Court of the United States.[71] "Because I have come to the conclusion that both the common law of a state [New York] and a statute of the United States declare the right

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[69] Colorado Laws 1915, Ch. 180.

[70] See Wu, Readings from Ancient Chinese Codes, 19 MICH. LAW REVIEW 501, 506.

[71] 254 U. S. 443, 488 (1921).

Compare the following superb statement of the true issue: "Industrial liberty, like civil liberty, must rest upon the solid foundation of the law. Disregard the law in either, however good your motives, and you have anarchy. The plea of trade unions for immunity, be it from injunction or

of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature, which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat."

It is respectfully submitted that if there is such a thing in the realm of jurisprudence as a "right" without "constitutional or moral sanction," it finds no sanctuary in the law of public utilities, which is the law of reasonableness, and there seems to be nothing in law or reason to compel the courts to sit helplessly by and see this juristic *nullius filius* throttle the life currents of the community.

Let this law of reasonableness be brought home to the people; let it be simplified and speedy in administration, and then let it be unflinchingly enforced for the protection of the common interest through the regulation of both labor and capital in the public utility field. Then, and then only, shall we be secure in the continuity of those necessary public services upon which the mass of our people are dependent for their daily existence.

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from liability for damages, is as fallacious as the pleas of the lynchers. If lawless methods are pursued by trades unions, whether it be by violence or by intimidation, or by the more peaceful infringement of legal rights, that lawlessness must be put down at once and at any cost." 1 LAW AND LABOR 83 (July, 1919).